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Re: Notice of Violations of the Endangered Species Act In Connection with the U.S. Environmental Protection Agency's Outer Continental Shelf Air Quality Permit for the Cape Wind Energy Project

This letter is sent on behalf of the Alliance to Protect Nantucket Sound, Public Employees for Environmental Responsibility ("PEER"), Three Bays Preservation, Cetacean Society International, Pegasus Foundation, Californians for Renewable Energy, Lower Laguna Madre Foundation, and Barbara Durkin and Martha Powers as private citizens. Pursuant to the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g) ("ESA"), these conservation organizations and individuals -- collectively referred to as "the Alliance *et al.*" -- hereby put you on notice that the U.S. Environmental Protection Agency is in violation of section 7 of the ESA, 16 U.S.C. § 1536, and the Act's implementing regulations, with regard to EPA's Outer Continental Shelf air quality permit ("OCS permit") for the Cape Wind Energy Project. Accordingly, EPA should immediately take steps to bring itself into compliance with the ESA, including by suspending the OCS permit.

In issuing an OCS permit for the project, EPA did not engage in any ESA section 7 consultation of its own with either the Fish and Wildlife Service ("FWS") or National Marine Fisheries Service ("NMFS"), although it is indisputable that the project "may affect" a number of listed species, which is the regulatory trigger for formal consultation. 50 C.F.R. § 402.14(a). Rather, EPA has expressly "relied on" the formal consultations conducted between the Services and the Bureau of Ocean Energy Management ("BOEM") and its predecessor agency, and the Biological Opinions ("BiOps") and incidental take statements ("ITS") issued by FWS and NMFS resulting from those consultations. See EPA, *Fact Sheet: Outer Continental Shelf Air Permit Approval: Cape Wind Energy Project*, at 51 (Attachment A). In explaining why it was relying on these consultation documents, EPA has stated that "NMFS and FWS each prepared Biological Opinions" which found that the project would in fact harm various listed species and hence included ITS's -- in the case of FWS, an ITS "focused on roseate terns and piping plovers," and in the case of NMFS, an ITS "focused on" various species of sea turtles. *Id.*

Consequently, "based on the results of these consultations," EPA "propos[ed] to include a condition within the OCS air permit requiring that, if at any time during the life of the project, either FWS or NMFS requests that ESA consultation be re-initiated, withdraws an Incidental Take Statement, or determines that that the requirement of the ESA are not being satisfied, Cape Wind must notify EPA." *Id.* The specific condition ultimately incorporated into the OCS permit provides as follows:

Endangered Species Act: If at any time during the life of the Project, either the United States Fish and Wildlife Service or the National Marine Fisheries Service, or a successor agency, request that Endangered Species Act (ESA) consultation be re-initiated, withdraws an Incidental Take Statement, or determines that the requirements of the ESA are not being satisfied, the owner/operator shall notify EPA within five (5) calendar days of its receipt of such request, withdrawal, or determination.

EPA, *Outer Continental Shelf Air Permit issued to Cape Wind Associates, Inc.* (Attachment B). The obvious purpose of this condition was to allow EPA to take appropriate action in the event that the ESA consultations, BiOps, and ITS's on which EPA was relying were not longer deemed to be valid.

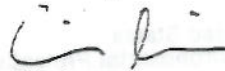
On March 14, 2014, however, the U.S. District Court for the District of Columbia held that both BiOps on which EPA has relied are in fact legally defective. See *Public Employees for Env'tl Resp. v. Beaudreu*, __ F. Supp. 2d __ 2014 WL 985394, at **24-26, 29-30 (D.D.C. Mar. 14, 2014). With respect to impacts on Roseate terns and Piping plovers, the Court held that the BiOp and ITS were unlawful because the FWS "improperly delegated to Cape Wind and to the BOEM decisions concerning certain reasonable and prudent minimization measures" – i.e., the temporary and seasonal shutdown of the turbines through the feathering of the rotors in order to protect ESA-listed birds that routinely move through the project area. *Id.* at **24, 25. With regard to impacts on the Right whale, the Court held that NMFS violated the ESA by failing to include any ITS for Right whales although this critically endangered species may indeed be harmed by the project in a number of ways. See *id.* at *29 ("Here, NMFS included no incidental take statement for right whales, despite the fact that the whales have traversed the Cape Wind project area and appeared along routes that will be traveled by project vessels."). In light of these legal violations, the Court remanded the respective BiOps to the Services so that they could be brought into compliance with the ESA.

Because EPA opted to rely expressly and entirely on BOEM's formal consultations with the Services, and EPA chose to conduct no independent consultation of its own, and because the consultations and the BiOps/ITS's on which EPA has relied have now been held by a federal court to be conducted unlawfully, it unavoidably follows that ***EPA is also now in violation of its ESA section 7 obligations with respect to EPA's approval of the OCS permit.***

Accordingly, in keeping with the terms of the OCS permit, which plainly contemplates that EPA will take appropriate action under the very circumstances that have now arisen, EPA should immediately suspend the permit pending fulfillment of the remand of the two unlawful consultations on which EPA has relied and a determination by the Court that those remands have been performed in a manner that fully rectifies the violations. Moreover, because it is now abundantly clear that EPA can no longer reasonably rely on BOEM and the Services to carry out EPA's own consultation obligations, EPA should become directly involved in the remanded consultations in order to ensure that the ESA's requirements are carried out in the manner that the Court directed.¹

¹ For example, EPA should insist that the FWS engage in a genuinely "independent" evaluation of the feasibility of the feathering measure urged by Service biologists and not, yet again, capitulate to undue pressure from CWA or others. Likewise, EPA should insist that NMFS adopt an incidental take statement for Right whales that is in full compliance with the ESA and implementing regulations, and is based on all of the available scientific evidence concerning the presence of, and risks posed to, Right whales in the action area.

Sincerely,



Eric R. Giltzenstein

Enc.



United States
Environmental Protection
Agency New England

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FACT SHEET

Outer Continental Shelf Air Permit Approval:
Cape Wind Energy Project

Horseshoe Shoal
Nantucket Sound, Massachusetts

Offshore Renewable Wind Energy Project

EPA Draft Permit Number
OCS-R1-01

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MMS's general conformity and NEPA analyses. Based on that review, EPA is satisfied that the project emissions will not result in air quality exceeding ambient air quality standards for NO₂, CO, SO₂, PM₁₀, or PM_{2.5}, and is not requiring further modeling. Please refer to Attachment I, memo from Brian Hennessey to Brendan McCahill dated June 3, 2010.

XII. ENDANGERED SPECIES ACT

Pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and its implementing regulations at 50 C.F.R. part 402, EPA is required to ensure that any action authorized, funded, or carried out by the Agency is not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of such species' designated critical habitat. Section 9 of the ESA prohibits the taking of endangered species. This project involves several federal agencies whose actions are subject to the ESA.

In a May 19, 2008 letter from the Minerals Management Service (MMS) to the National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (FWS), MMS requested formal consultation under Section 7 of the ESA on behalf of itself and, as lead federal agency, of EPA. MMS provided a Biological Assessment, and NMFS and FWS each prepared Biological Opinions.³² FWS's Biological Opinion included an Incidental Take Statement (focused on roseate terns and piping plovers) and provided reasonable and prudent measures (RPMs) as well as terms and conditions necessary for exemption from the prohibitions of ESA § 9. *See* FWS Biological Opinion, at 75-76. Similarly, NMFS provided an Incidental Take Statement (focused on loggerhead, Kemp's ridley, green, and leatherback sea turtles), RPMs, and terms and conditions for exemption from the prohibitions of ESA § 9. *See* NMFS Biological Opinion, at 102-104.

EPA has relied on MMS's ESA consultations to fulfill EPA's obligations under the ESA for this project. Based on the results of these consultations, and after review of the terms, conditions, and RPMs in the FWS and NMFS BOs, EPA proposes to include a condition within the OCS air permit requiring that, if at any time during the life of the project, either FWS or NMFS requests that ESA consultation be re-initiated, withdraws an Incidental Take Statement, or determines that the requirements of the ESA are not being satisfied, Cape Wind must notify EPA.

³² *See* Cape Wind Energy Project, Nantucket Sound: Biological Assessment (MMS, May 2008), available at <http://www.mms.gov/offshore/PDFs/May2008CapeWindFinalBA.pdf>; Biological Opinion for the Cape Wind Energy Project, Nantucket Sound, Massachusetts (USFWS, Nov. 21, 2008), included in Cape Wind FEIS Appendix J, available at <http://www.mms.gov/offshore/RenewableEnergy/PDFs/FEIS/Appendix%20J%20-%20WFS%20and%20NOAA%20BOs.pdf>; National Marine Fisheries Service, Endangered Species Act Section 7 Consultation Biological Opinion (NMFS, Nov. 13, 2008), also appended to Cape Wind FEIS in Appendix J.



United States
Environmental Protection
Agency New England

Outer Continental Shelf Air Permit

issued to

Cape Wind Associates, LLC

for the


Cape Wind Energy Project
Offshore Renewable Wind Energy Project

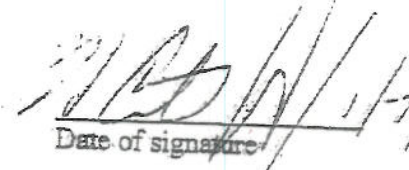
Horseshoe Shoal in Nantucket Sound

EPA Permit Number
OCS-R1-01

Pursuant to the provisions of Section 328 of the Clean Air Act (CAA) and the Code of Federal Regulations (C.F.R.) Title 40, Part 55, the United States Environmental Protection Agency-New England (EPA) is proposing to issue an Outer Continental Shelf (OCS) air quality permit to Cape Wind Associates, LLC (Cape Wind). Cape Wind proposes to construct and operate 130 wind turbine generators (WTGs) and other supporting equipment (The Project) in a grid pattern on or near the Horseshoe Shoal in Nantucket Sound off the coast of Massachusetts.

The design, construction and operation of the Project shall be subject to the attached permit conditions and permit limitations. This permit shall be effective 30 days after the date of signature unless (1) review is requested on the permit under 40 C.F.R. § 124.19, in which case the permit shall be effective when provided by 40 C.F.R. § 124.19(f), or (2) no comments requesting a change in the draft permit are received, in which case the permit shall be effective immediately upon signature. The permit shall remain in effect until it is surrendered to EPA. This permit becomes invalid if Cape Wind does not commence construction within 18 months after the permit's effective date. EPA may extend the 18-month period upon a satisfactory showing that an extension is justified. This permit does not relieve the Cape Wind from the obligation to comply with applicable state and federal air pollution control rules and regulations.


H. Curtis Spalding
Regional Administrator


Date of signature 1/7/2011

Acronyms and Abbreviations

Cape Wind	Cape Wind Associates, LLC
C.F.R.	Code of Federal Regulations
CI	Compression Ignition
CO	Carbon Monoxide
EPA	Environmental Protection Agency
ESA	Endangered Species Act
g/hp-hr	Grams per horsepower-hour
g/kw-hr	Grams per kilowatt-hour
kW	Kilowatt
NMHC	Non-methane hydrocarbons
NOx	Nitrogen Oxides
OCS	Outer Continental Shelf
PM	Particulate matter
The Project	Wind turbines and supporting equipment
WTG	Wind Turbine Generator

Environmental Protection Agency - New England

Outer Continental Shelf Air Permit

Cape Wind Energy Associates, LLC Cape Wind Energy Project

Permit Terms and Conditions

I. Background for informational purposes

On December 17, 2008, Cape Wind filed an OCS air permit application with EPA. Cape Wind proposes to install and operate 130 WTGs and other supporting equipment (The Project) in a grid pattern on or near the Horseshoe Shoal in Nantucket Sound. This air permit approves Cape Wind's application and regulates the pollutants emitted from the preconstruction, construction and operation activities of the proposed wind energy facility.

For air permitting purposes, the Project is divided into three sections that closely track the life cycle or phases of the Cape Wind project. Phase 1 includes site preparation and construction of the Project; Phase 2 includes operations, maintenance and repair of the Project; and Phase 3 includes decommissioning and removal of the project. This permit includes emissions and operational requirements applicable to Phases 1 and 2. All permit requirements apply during both Phase 1 and Phase 2 except where specifically provided otherwise. EPA is not including the requirements for Phase 3 at this time.

This permit organization is different from most air permits. Typically, state and federal air regulations define emissions that result from the construction and decommissioning of a new source as "secondary emissions" that are not regulated under the air permit. However, the definition of "OCS source" in section 328 of the Clean Air Act and 40 Part C.F.R. Part 55 is broader in scope than EPA's regulations for land-based stationary sources. The OCS source definition requires EPA to include emissions from certain on-site construction equipment in the air permit. The OCS regulations also require EPA to include pollutants emitted from vessels that service Cape Wind in the "potential emissions" of Cape Wind.

II. Definitions

The following definitions shall be used for the purposes of this permit only. Terms not otherwise defined in this permit have the meaning assigned to them in the referenced Clean Air Act provisions and EPA regulations (including the Massachusetts regulations incorporated by reference into 40 C.F.R. Part 55).

The owner/operator includes Cape Wind Associates, LLC; its successor(s) in operating the permitted project; its contractors; and any agents or parties acting on its

behalf that conduct activities regulated by this permit, including but not limited to vessel, barge, and equipment operators.

Vessel has its normal meaning under the Clean Air Act, and specifically includes both (1) self-propelled vessels and (2) barges or other non-self-propelled vessels that must be towed by another vessel. It includes vessels with or without jacking systems.

Jack-up Unit means a vessel (whether self-propelled or not) that includes legs and a lifting system that enables the vessel to lower its legs into the seabed and elevate its hull to provide a stable work deck. Such a vessel is considered a Jack-up Unit at all times, including when it is not attached to the seabed.

Non-stationary Engine means any engine, including but not limited to a vessel propulsion engine, that (1) is not engaged or participating in an OCS Activity, and (2) is on a vessel that (a) is not itself an OCS Source, but (b) is physically attached to an OCS Source. While a vessel is physically attached to an OCS Source, all of its operating engines (including propulsion engines) that are *not* participating in the OCS Source's OCS Activities are considered Non-stationary Engines.

Non-stationary Engine Emissions means all emissions from Non-stationary Engines during a given period of time.

OCS Attachment means the moment when at least three legs from a Jack-up Unit have attached to the seafloor.

OCS Detachment means the moment when a Jack-up Unit has retracted enough of its legs so that fewer than three legs remain attached to the seafloor.

OCS Activity means activity relating to the construction, operation or maintenance or any other pollutant-emitting activity conducted by a vessel, or equipment on a vessel, from the time of the vessel's OCS Attachment to the time of the vessel's OCS Detachment.

OCS Source means any equipment, activity, or facility, including vessels, that emits or has the potential to emit any air pollutant and is or will be used to conduct an OCS Activity as part of the permitted project. A vessel or equipment on a vessel becomes an OCS Source each time the vessel completes an OCS Attachment, and ceases to be an OCS Source each time the vessel completes an OCS Detachment.

OCS Source Emissions means the emissions from any OCS Source during an OCS Source Period.

OCS Source Period means each period of time from when a vessel completes an OCS Attachment to when the vessel completes an OCS Detachment.

OCS Stationary Engine means (1) any engine on an OCS Source that operates during

X. General Requirements

A. The owner/operator shall display a copy of this permit on each Jack-up Unit, in a reasonably accessible location as near to the subject equipment as is practical.

B. After the occurrence of any violation of any emission limitation or condition contained herein, the owner/operator must notify EPA New England, Office of Environmental Stewardship, attention Compliance and Enforcement Chief, by FAX at (617) 918-1810 within two business days, and subsequently in writing to the address listed in Section XVI below within seven calendar days.

XI. Special Conditions

A. Phase 1 Extension: The owner/operator may request an extension of the Phase 1 End Date. The owner/operator must submit any such request no later than 18 months after the Phase 1 Start Date, and in that request, demonstrate the following:

1. The owner/operator has complied with all Phase 1 permit requirements;
2. For good cause, the owner/operator requires limited additional operation under the permit conditions applicable to Phase 1, rather than Phase 2;
3. The owner/operator can continue to comply with all Phase 1 permit requirements (including the obligation to possess adequate emissions offsets) during the additional period under Phase 1;
4. All requirements applicable to the project outside of this permit will continue to be satisfied during the extension.

EPA will review the owner/operator's request and any other relevant information to determine whether the request satisfies the requirements of Section XI.A.1-4; is reasonable in light of the information in the request and all other relevant circumstances; and is consistent with the CAA, its implementing regulations, and the requirements of this permit (including but not limited to monitoring, recordkeeping and reporting requirements). If EPA determines that the owner/operator's request satisfies the preceding requirements, then EPA will, by letter, extend the Phase 1 End Date. All Phase 1 permit requirements, including Section IV.B, will continue to apply until the extended Phase 1 End Date.

~~B. Endangered Species Act. At any time during the life of the Project, either the United States Fish and Wildlife Service or the National Marine Fisheries Service, or a successor agency, request that Endangered Species Act (ESA) consultation be initiated, withdraw an Incidental Take Statement, or determine that the requirements of the ESA are not being satisfied, the owner/operator shall notify EPA within five (5) calendar days of its receipt of~~

~~such request, withdrawal, or determination.~~

C. Prevention & Abatement of Air Pollution Episodes & Emergencies

1. No later than 180 days before the Phase 1 Start Date, the owner/operator shall submit to EPA a Standby Emission Reduction Plan (ERP) that the owner/operator would implement to reduce air contaminants if the Massachusetts Department of Environmental Protection declares an Air Pollution Episode under 310 C.M.R. 8.00 during Phase 1. The plan shall identify the sources of air contaminants, the approximate amount of reduction of contaminants, and a brief description of the manner in which the reduction will be achieved. If EPA determines that the ERP is inadequate, EPA will disapprove the plan, give the reasons for disapproval, and require resubmittal of an amended plan in a reasonable period of time as determined by EPA.
2. If an Air Pollution Episode is declared during Phase 1, the owner/operator shall implement the standby ERP.
3. If, pursuant to 310 C.M.R. 8.05, the Massachusetts Department of Environmental Protection declares an Air Pollution Episode Alert, Air Pollution Episode Warning, or Air Pollution Episode Emergency for particulate matter and/or sulfur dioxide, then the owner/operator shall stop all construction activities that generate air pollutants until the Department terminates the Alert, Warning, or Emergency.
4. If, pursuant to 310 C.M.R. 8.15, the Massachusetts Department of Environmental Protection declares an Air Pollution Incident Emergency and issues orders to construction projects and/or vessels in southeastern Massachusetts, then the owner/operator shall comply with such order.

XII. Right of Entry

A. The owner/operator shall allow all authorized representatives of EPA, upon presentation of credentials, to enter upon or through the facility where records required under this permit are kept. The owner/operator shall allow such authorized representatives, at reasonable times:

1. To access and copy any records that must be kept under this permit;
2. To inspect any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under this permit; and
3. To monitor substances or parameters for the purpose of assuring compliance with this permit.